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IN THE

Supreme Court of the United States

October, 1981

TERRELL DON HUTTO, Director
Virginia State Department of Corrections

AND

GENE M. JOHNSON, Superintendent
Powhatan Correctional Center,
Petitioners,

v.

ROGER TRENTON DAVIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS CONSIDER RUMMEL IN DECIDING THE CASE ON REHEARING EN BANC, AND PROPERLY DETERMINE THAT RUMMEL DOES NOT COMPEL REVERSAL OF THE DISTRICT COURT DECISION?

2. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE DISTRICT COURT, RELYING ON OBJECTIVE FACTORS UNIQUE TO THIS CASE, PROPERLY RULED THAT DAVIS' SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

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BRIEF IN OPPOSITION TO PETITION FOR

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OPINIONS BELOW

The latest opinion of the Fourth Circuit en banc is reported at 646 F.2d 123. The first en banc decision of the Fourth Circuit is reported at 601 F.2d 153, and the original panel decision is reported at 585 F.2d 122. The opinion of the United States District Court is reported at 432 F. Supp. 444.

JURISDICTION

Same as cited by Petitioners.

STATUTES INVOLVED

Virginia Code Annotated, § 18.2-10, as amended:

PUNISHMENT FOR CONVICTION OF FELONY.

> The authorized punishments for conviction of a felony are:
>
> (a) For Class 1 felonies, death, or imprisonment for life.
>
> (b) For Class 2 felonies, imprisonment for life or for any term not less than twenty years.
>
> (c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.
>
> (d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than ten years.
>
> (e) For Class 5 felonies, a term of imprisonment

of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both. (1975, cc. 14, 15; 1977, c. 492).

Virginia Code Annotated, § 18.2-248, as amended;

PENALTIES FOR MANUFACTURE, SALE, GIFT, DISTRIBUTION OF POSSESSION OF A CONTROLLED DRUG.

Except as authorized... it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell give or distribute a controlled substance.

(a) Any person who violates this section with

respect to a controlled substance classified in Schedules I, II, or III shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars. .

Virginia Code Annotated, § 18.2-248.1, as amended:

PENALTIES FOR SALE, GIFT, DISTRIBUTION OR POSSESSION WITH INTENT TO SELL, GIVE OR DISTRIBUTE MARIJUANA.

Except as authorized... it shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.

(a) Any person who violates this section with respect to:

(1) Not more than one-half ounce of marijuana is guilty of a Class 1 misdemeanor;

(2) More than one-half ounce but not more than five pounds of marijuana is guilty of a Class 5 felony;

(3) More than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years. .

STATEMENT OF THE CASE

Respondent, Roger Trenton Davis, was tried before a jury on March 18, 1974 in the Circuit Court of Wythe County, Virginia, and was convicted of distribution of marijuana and possession of marijuana with intent to distribute. Although the total quantity of marijuana involved in the two offenses was less than nine ounces, Davis was sentenced to twenty (20) years of imprisonment and fined Ten Thousand Dollars ($10,000.00) on each of the two charges, pursuant to Virginia Code § 18.2-248. (Later amended, as will be discussed more fully below). The sentences were to be served consecutively. Davis filed a Petition for Writ of Error with the Supreme Court of Virginia, which denied

his petition, thereby affirming the judgment of the lower court.

Davis then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia. After a plenary hearing there, Chief District Judge James C. Turk granted the writ, finding Davis' punishment to be cruel and unusual in contravention of the Eighth Amendment. See Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977).

The Commonwealth appealed to the Fourth Circuit, which reversed the district court in a decision authored by Judge Emory Widener. See Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978). Davis filed a petition for rehearing en banc, and on June 29, 1979 the Fourth

Circuit, sitting en banc, reversed the panel decision in a brief per curiam opinion, affirming the judgment of the distict court, which had found the sentence imposed to be grossly excessive and in violation of the Eighth Amendment. Davis v. Davis, 601 F.2d 153 (4th Cir. 1979). The Commonwealth then filed a Petition for a Writ of Certiorari in this Court, which vacated the circuit court decision and remanded the case for further consideration in light of Rummel v. Estelle, 445 U.S. 263 (1980). See 445 U.S. 947 (1980). Following a second hearing en banc and a reconsideration of the case based upon Rummel, the Fourth Circuit reaffirmed its earlier decision. Hutto v. Davis, 646 F.2d 123 (4th Cir. 1981).

This case was originally tried in Wythe County, Virginia, on March 18, 1974. Shortly before trial, the Commonwealth agreed through a stipulation that the marijuana possession charge involved only 168 grams found in the back yard behind the Davis residence. The remainder, approximately three ounces, was allegedly sold to Danny Ray Eads for $74.00, the money having been provided Eads by the police.

Eads, the central figure in Davis' apprehension, a 20-year old convicted felon, had sought a furlough from nearby Bland Correctional Center and was asked to assist in the arrest of several persons, one being the defendant, on drug related charges. He testified on direct examination that he sought a furlough so he could "bust

those persons selling drugs to his wife" and to protect the welfare of his two-year old daughter. While denying he had made a "deal" with the authorities, he admitted that he had been subjected to a violent homosexual assault during his previous incarceration and had attempted a suicide (cut his wrists) just before being denied a furlough in September, 1973. He conceded on cross examination that his true motive for offering assistance to the police was that of "getting [his] daughter away from [his] wife." It was also elicited on cross examination that Eads anticipated being paroled on June 4, 1974, less than three months following his testimony at the Davis trial. He was shown as a desperate man who would do anything to secure his freedom.

Eads testified that after his furlough in October, 1973, he met with police and devised a scheme to make a purchase of drugs from Davis and others. During cross examination he conceded that when he first encountered Roger Davis on Main Street in Wytheville, with the police watching, it was he, Eads, who first broached the subject of drugs.

He then proceeded to Davis' home where he allegedly purchased less than three ounces of marijuana for $74.00. Although other contraband was allegedly given to Eads, no other charges were pressed against Davis. Although Eads was apparently wired for sound, given the extremely poor quality of the recordings, it is not clear from the record what portions of Eads' conversation with Davis, if any, were audible to the jury.

At the ore tenus hearing conducted July 6, 1976, in the district court, Davis presented the expert testimony of Dr. Dorothy B. Whipple, a noted authority on children's diseases and author of many works on drugs and drug abuse. Dr. Whipple's testimony provided a scientific basis upon which to measure the danger to society posed by the underlying offences in question.

Based on her many years of study of this area of medicine, Dr. Whipple stated unequivocally that the use of marijuana does not lead to physical or mental deterioration and that the drug is not addicting in a physiological sense. She analogized the "habit-forming" effects of marijuana smoking to those of drinking a glass of orange juice for breakfast, noting that of all recreational drugs, such as alcohol and tobacco, marijuana "is

probably the least harmful." (Emphasis added)

On cross examination, Dr. Whipple was asked whether tetrahydrocannabinol (THC, the active chemical in marijuana) is toxic, to which she replied that "of all the psychoactive drugs, marijuana is the least likely to produce death." She pointed out that a person can die from alcohol quite easily given a big dose, but that no death has ever been reported in the United States due to marijuana alone. When asked whether criminal penalties were not a help to a young person in combatting peer pressure to smoke marijuana, Dr. Whipple responded that she thought that "the law has had absolutely no effect whatsoever in reducing the amount of marijuana used among youth." She further noted that while penalties for marijuana possession and

usage had increased, during the same period of time the use of marijuana had "crescendoed."

Pursuant to the Commonwealth's request that they be given an opportunity to produce their own expert testimony concerning the use and effects of marijuana, a de bene esse deposition was conducted on August 26, 1976, of Dr. William P. Moore, a clinical psychiatrist practicing in Jenkintown, Pennsylvania. He testified as to alleged harmful effects of marijuana usage based upon studies he had performed. On cross examination, Dr. Moore admitted that only routine neurological tests were performed on his subjects and that less than half had been given the standard battery of psychological tests. Moore could not deny that he based his findings upon his patients' own perceptions of their

symptoms without any independent observation of those systems outside of the doctor's office.

Evidence was also presented in the district court to show the number of persons convicted of drug-related offenses in Virginia and the lengths of sentences given for such offenses. A precise computation was introduced, through a stipulation, which specified that during the period between October 31, 1975 and August 19, 1976, out of a total of 117 inmates who were committed in Virginia for possessing, selling and/or manufacturing marijuana, the average sentence for these offenses was 3 years, 2 months; the maximum sentence (for any quantity) was 15 years.

Further evidence of the nature of punishment rendered in Virginia, and elsewhere, was provided in a Supplemental Stipulation of Fact con-

sisting of a letter from Thomas B. Baird, Jr., Esq., the Commonwealth's Attorney who prosecuted the cases against Davis in the Wythe County Circuit Court. Baird wrote that although he had heretofore strenuously opposed Davis' release, "the sentence [sic] now being imposed throughout the majority [sic] of the Commonwealth and the Nation for comparable acts of drug distribution are extremely light and in most cases, insignificant." He continued by stating, "[i]n view of such, I think a gross injustice would be done should I not recommend his immediate release with the remainder of his term suspended."

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CONSIDERED RUMMEL V. ESTELLE, 445 U.S. 263 (1980) IN DECIDING THIS CASE ON REMAND, AND PROPERLY DETERMINED THAT RUMMEL DOES

NOT COMPEL REVERSAL OF THE DISTRICT COURT DECISION.

This Court vacated the prior en banc affirmance of the district court's grant of a writ of habeas corpus, and remanded to the Fourth Circuit for reconsideration in light of Rummel v. Estelle, 445 U.S. 263 (1980). The Fourth Circuit correctly decided that Rummel does not require reversal of the previously-affirmed district court opinion. While Mr. Justice Rehnquist, writing for the majority, declined to find Rummel's life sentence under the Texas recidivist statute to be cruel and unusual punishment, his overriding concern was the compelling interest of the State of Texas "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as

established by its criminal law." 445 U.S. at 276. Rummel had been "graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail." 445 U.S. at 278. No such opportunity exists in this case to justify the imposition of a 40-year sentence.

The majority opinion specifically reserved the question of "whether Texas could impose a life sentence upon Rummel merely for obtaining $120.75 by false pretenses." Id. That is the question addressed by the district court in this case. There is no enhanced sentencing provision in this case, which involves a 40-year sentence for two offenses involving extremely small amounts of marijuana, having a "street" value of approximately $200.00. Davis was not sentenced as a recidivist, and the Commonwealth has

shown no compelling interest in having him incarcerated for twice the maximum punishment prescribed by Virginia for second degree murder. See Va. Code § 18.2-23.

Both the majority and dissenting opinions in Rummel indicate that a proportionality analysis should be applied in the extreme case of a life sentence for overtime parking. The case at hand approaches that degree of irrationality. The district court found, based on evidence presented to it, that the crime involved "minimal, debatable danger to the person." 432 F. Supp. at 452. In some jurisdictions, offenses involving small amounts of marijuana are now treated very much like parking tickets, with the offender mailing in a nominal fine. See, e.g., Oregon Rev. Stat. § 167.207 et seq. The forty-year sentence imposed on

Davis approximated his life expectancy at the time it was handed down, without discounting for the dangers of the penal environment. This case thus represents a version of the "extreme example" noted by the Court in Rummel.

Furthermore, Rummel did not totally reject disproportionality as a ground for challenging a sentence on Eighth Amendment terms; but rather, in reviewing the scheme of punishment for recidivists in Texas, questioned the efficacy of the traditional gauges frequently applied in determining disproportionality. In fact, the Court's opinion in Rummel weighed several factors, including the sentence given, the nature of the crime(s), comparative sentences available in other jurisdictions, and society's interest in punishment, concluding that Rummel's

sentence did not constitute cruel and unusual punishment. Finding a particular analysis inappropriate to a particular case is far different from rejecting that analysis in toto.

The Commonwealth cites Hayes v. Bordenkircher, 621 F.2d 846 (6th Cir. 1980) for the proposition that "'Rummel v. Estelle removes the Hart [v. Coiner, 483 F.2d 136 (4th Cir. 1973)] tests from our consideration.' 621 F.2d at 848." Like Rummel, Hayes was a recidivist case involving a defendant convicted of a third felony and sentenced to life imprisonment. Following the precepts of Rummel, the Sixth Circuit found the state's interest in discouraging recidivism to be so strong that a life sentence could never be disproportionate to a recidivist's crimes. Although the Sixth Circuit ruled that the Hart ana-

lysis was not applicable to Hayes, that decision did not purport to reject the use of the proportionality test to gauge the constitutionality of the sentence imposed for a substantive offense.

Similarly, the Commonwealth notes United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980) (15 years not unconstitutional punishment for participating in large-scale LSD manufacturing and distribution operation involving more than 250,000 doses of LSD); Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980) (Life imprisonment for rape not unconstitutional); and Government of Virgin Islands v. Berry, 631 F.2d 214 (3d Cir. 1980) (35 years for second-degree murder not disproportionate), as citing Rummel in support of their conclusions. To compare possession and sale of less than nine

ounces of marijuana to murder, rape, or manufacturing a quarter-million doses of LSD only serves to highlight the triviality of Davis' crimes.

Another case cited by the Commonwealth, Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981), decided en banc by a sharply divided court, upheld the imposition of a life sentence on a heroin addict who had sold 19 packets of heroin to undercover police agents. Judge Rubin, writing for a plurality of ten circuit judges (two judges having concurred in part with the opinion but filed separate concurrences) found that "[a] life sentence for the crime of distributing heroin serves substantial state interests in the same manner that state interests were served by a life sentence for recidivism in Rummel." 646 F.2d at 1002. He further stated that Louisiana "could reasonably treat

heroin distribution as a serious crime equivalent to crimes of violence." Id. Although reciting that the Court in Rummel had rejected Fifth Circuit's proportionality analysis contained in earlier Rummel decisions, he acknowledged that Mr. Justice Rehnquist, in Rummel, had recognized "that a proportionality principle could come into play in an 'extreme example'." Id.

Nine circuit judges in Terrebonne joined in Judge Frank Johnson's lengthy dissenting opinion, which pointed out that the Rummel court had in fact used the concept of proportionality in upholding the life sentence in that case. Judge Johnson aptly noted that "[t]he extremely valid interest that states have in punishing or isolating those criminals who have demonstrated a propensity for com-

mitting criminal acts cannot easily be compared to the interest of a state in making criminal one specific act." 646 F.2d at 1005. According to Judge Johnson, although the use of the three-pronged test to determine disproportionality may have been inappropriate in evaluating recidivist laws, "the Supreme Court did not foreclose the use of that criterion in challenges to other statutes." Id. at 1006.

Close scrutiny of the various circuit court decisions applying the tenets of Rummel reveal no meaningful conflicts between them. All of the cases decided thus far which have upheld the sentences against Eighth Amendment challenges have involved either serious crimes of violence or highly dangerous or addictive drugs. The case at bar easily fits into that category of an "extreme example" of

where the punishment is so grossly disproportionate to the offenses it mandates the application of the objective factors so carefully employed by the district court below.

The preservation of federalism and allocation of powers between the state and federal governments is stressed in Rummel. Mr. Justice Stewart, in his concurrence, indicated that his unwillingness to invalidate the recidivist legislation of Texas was based upon a deference to the state's automony in the exercise of its police power. No such concern need sway the decision in this case, since the General Assembly of Virginia has seen fit to change the penalties to allow for sentencing which is proportionate to the amount of marijuana involved. The maximum sentence has now been reduced to 10 years (from 40 years) for

each count of distribution or possession with intent to distribute a quantity ranging from one-half ounce to five pounds. Va. Code § 18.2-248.1. The finding of the district court that defendant's sentence in this case constitutes cruel and unusual punishment is, although antecedent, entirely consonant with the expressed judgment of the elected representatives of the people of Virginia. Rather than deferring to a legislative judgment which the Virginia General Assembly itself has abandoned, the Court should allow the defendant's sentence to be abrogated in accordance with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1956).

II

THE FOURTH CIRCUIT CORRECTLY FOUND THAT THE DISTRICT COURT, RELYING ON OBJECTIVE FACTORS UNIQUE TO THIS CASE, PROPERLY RULED THAT DAVIS' SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The function of the court of appeals is not to substitute its judgment for that of the district court, nor to retry factual issues. Britton v. Rogers, supra. The district court's factual determinations in habeas corpus cases should be affirmed "unless the findings are clearly erroneous." Crabtree v. Boles, 339 F.2d 22, 24 (4th Cir. 1964). The district court in this case heard evidence and made detailed findings of fact applying objective factors in determining that Davis' punishment was cruel and unusual. The Fourth Circuit properly refused to overturn findings of fact based upon objective criteria

where those findings were not shown to be clearly erroneous.

This Court in Rummel stressed the importance of using "objective factors" in formulating Eighth Amendment judgments. While the Court noted that the death penalty decisions are of limited usefulness in determining whether a sentence constitutes cruel and unusual punishment, 445 U.S. at 272, the plurality opinion in Coker v. Georgia, 433 U.S. 584 (1977) is cited as being informed by "objective factors." 445 U.S. at 284. Mr. Justice Rehnquist notes that in Coker the Court was able to discern a "bright line" between death and all terms of imprisonment. Even though "considerably clearer" there "than would be any constitutional distinction between one term of years and shorter terms of years," 445 U.S. at 275, the possibi-

lity of judging terms of years using these objective criteria was not totally rejected in Rummel. Mr. Justice Rehnquist's stated concern was that "the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of the individual Justices." Id.

The disproportinality analysis applied by the district court in this case was not designed to determine whether, in general, a 40-year sentence and $20,000.00 fine is cruel and unusual punishment for possession and sale of marijuana; rather, it was used to determine whether that sentence is disproportionate to this particular crime. Judge Turk, in addressing this issue, observed as follows:

> Clearly, the relevant question specifically concerns whether the sentence of 40 years in the penitentiary and the imposition of twenty

> thousand dollars in fines for the possession and sale of less than nine ounces of marijuana is so grossly disproportionate that it ceases to be rational. The Virginia statute prohibiting the possession and sale of marijuana does not provide increased punishment corresponding to the quantity possessed or sold, and this court cannot so require. But neither can this court be blind, in determining proportionality, to the fact that the quantity involved is less than nine ounces. The important factor is not that the legislative purpose could be served by a less severe punishment, for that is a judgment for legislatures to make, but that it would be served by a "significantly less severe punishment." "If there is a significantly less severe punishment adequate to achieve the purpose for which the punishment is inflicted, [citations omitted] the punishment inflicted is unnecessary and therefore excessive." Furman v. Georgia, supra, at 279 (Brennan, J., concurring).

432 F. Supp. at 452 (footnote omitted).

The district court cited Gregg v. Georgia, 428 U.S. 153 (1976) as sup-

port for the proposition that proportionality is to be considered when a sentence is evaluated both in the abstract and as applied to a particular individual. Id. at 450, fn. 6. In Gregg, this Court upheld a sentence of death in a case where the jury was required to find certain factual bases making it appropriate (not disproportionate) to the particular crime involved. The Court specifically noted that "excessiveness" includes proportionality to the severity of the crime. 428 U.S. at 173, citing Trop v. Dulles 356 U.S. 86 (1958). In Robinson v. California, this Court found that while "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual... the question cannot be considered in the abstract." 370 U.S. 660, 667 (1962) (emphasis added).

The majority opinion in Rummel conceded that the Court might review the proportionality of the length of a sentence to the nature of the crime (445 U.S. at 274, fn. 11), but stressed throughout that "objective factors" must be considered in any such review. While not enumerating what objective criteria it would consider satisfactory, the Court cited Mr. Justice White's plurality opinion in Coker v. Georgia as employing such objective factors to consider whether a sentence is "'excessive' in relation to the crime committed" (and therefore barred by the Eighth Amendment). Included in these criteria were "public attitudes concerning a particular sentence--history and precedent, legislative attitudes, and the response of juries reflected in their sentencing." Coker, 433 U.S. at 592.

Among the objective factors analyzed by Judge Turk are the nature of the offense itself, the legislative purpose behind the punishment, the likely punishment for the same offense in other jurisdictions, the punishment in the forum state for other offenses and the punishment meted out for similar offenses within the forum state. 432 F. Supp. at 451-52. While these factors are not precisely the same as those listed by the Supreme Court in Coker, they do provide, as in Coker, a sound analytical basis for showing that the sentence involved is excessive when compared with the crime committed, and thus, unconstitutionally disproportionate.

One objective factor cited in Coker which is particularly applicable to this case is the history and patterns of legislative actions regarding

the punishment for a given crime. The Court in Coker meticulously examined the changing course of punishment for the crime of rape, 433 U.S. at 594-96, and found that a significant number of states whose death penalties were struck down did not re-enact the death penalty for that offense. Implicit here is a finding that the legislative purpose in preventing rape was apparently served by less severe punishments in those states.

Here, the district judge found that the legislative purpose behind Virginia's marijuana laws "is to stop the sale of a questionably harmful drug." 432 F. Supp. at 452. He based this finding concerning the lack of harmfulness upon expert testimony regarding the nature of marijuana and its effects. He emphasized that, to be constitutionally infirm, a sentence

must not only exceed the severity required to fulfill the legislative purpose, but there must be a "'significantly' less severe punishment adequate to serve the purpose for which the punishment is inflicted." Id. (Quoting Furman v. Georgia, 408 U.S. 238 (1972))

As previously noted, any conceivable legislative purpose in allowing lengthy sentences for convictions involving small amounts of marijuana has been abandoned by the changed statute providing graded penalties tied to the quantity involved. Since substantial, though lessened, penalties were retained (a sentence of up to 30 years for offences involving five pounds or more of marijuana), it must be concluded that the General Assembly

perceives that no valid legislative purpose is served by imposing forty year sentences in cases such as this. The value of "contemporary expression of legislative or public opinion" in making Eighth Amendment judgments as expressed in legislated changes is mentioned in Rummel as one objective factor which has been considered by the Supreme Court in previous cases. 445 U.S. at 280, fn. 22. Cf. Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975) vacated 423 U.S. 933.

While this Court had difficulty with Rummel's contention that there is a nationwide trend toward lighter, discretionary sentences for recidivists, no such problem exists in this case. There has been a continuous and steady movement in this country in recent years towards reducing penalties for offenses involving small amounts of

marijuana, resulting in "decriminalization" in a handful of states and greatly reduced penalties in many more, including Virginia.

In looking to history as a source of objective factors regarding the appropriateness of a given sentence, this Court in Coker looked not only at recent changes in the punishment prescribed by state legislatures for rape but also at the tendencies of juries to hand down such a sentence for that particular crime. The Court observed that the death penalty had been involved in 6 of the 63 cases appealed to the Georgia Supreme Court since 1972, noting the fact that "in the vast majority of cases, at least 9 out of 10 juries have not imposed the death sentence." 433 U.S. at 597.

Although the Court found Rummel's interjurisdictional analysis, with its recitation of a "complex hierarchy of statutes... not entirely convincing," 445 U.S. at 263, the problem with this factor lay in the difficulty of the analysis required, given the various punishments for recidivism, the discretion (if any) in their imposition, and the number of prior convictions required to trigger the penalty. The Court did not reject *in toto* the use of interjurisdictional analysis.

The interjurisdictional analysis and comparisons in this case are quite simple. Here the district court found that only three states had greater maximum sentences than Virginia for the distribution of marijuana, and that no state had a greater penalty for possession with intent to distribute,

irrespective of the quantity involved. 432 F. Supp at 452-53, fn. 10.

In the instant case, Judge Turk relied upon sentencing statistics in making his decision as to the appropriateness of the sentence in this case when compared with other cases involving the same offense. It was stipulated that during the period between October 31, 1975 and August 19, 1976, out of a total of 117 Virginia defendants who were sentenced for possessing, selling and/or manufacturing <u>any quantity</u> of marijuana, the longest sentence given was 15 years. For crimes involving 9 ounces of marijuana, Davis received almost three times what was otherwise the maximum sentence handed down. Such a sentence is so out of the ordinary course of things as to be shocking to the conscience, or, in the words of Judge

Turk, "so grossly disparate that it ceases to be rational." 432 F. Supp. at 452. Indeed, the sentence seems to be wholly unprecedented in Virginia. This freakish element clearly indicates the sentence to be arbitrary and capricious, an element not found in Rummel.

The Court in Coker looked also to the nature of the offense itself, and compared the moral depravity and injury to the victim and the public inherent in rape to the crime of murder, and found the former to merit less severe punishment. There is no dispute over the right of the State to impose reasonable punishments for crimes involving marijuana. However, the seriousness of the harm to society and the degree of moral depravity of the crime itself must be weighed as factors in determining the constitutionality of the sentence given. The

threat to society, or to any given person, resulting from the possession and distribution of very small quantities of marijuana, presents, as found by the district court here, "minimal, debatable danger to the person." 432 F. Supp. at 452.

The district court also examined the punishment available in Virginia for other crimes as objective evidence as to whether the punishment in this case was disproportionate to the nature of the offense.

> In Virginia, at the time of Davis' convictions, other offenses which carried maximum sentences of twenty years included murder in the second degree; mob shooting, stabbing, etc. with intent to maim or kill; abduction; attempt to poison with intent to kill or injure; malicious shooting, stabbing, etc. with intent to maim, disfigure, disable or kill; and attempted murder. Chapter 358, §§ 18.1-23, 30, 37, 64,65, Virginia Acts of Assembly, 1960 session.

> Voluntary manslaughter, wounding a person in attempting or committing a felony, and taking indecent sexual liberties with children on the other hand carried only five year maximum sentences. Chapter 358 §§ 18.1-24, 68, 215(4), Virginia Acts of Assembly, 1960 session. Further, this court cannot help but notice that for distribution, as far as punishment is concerned, the Virginia legislature makes no differentiation of heroin from marijuana.

Id. at 453.

Given the estimate made by Dr. Dorothy B. Whipple at the district court proceeding that 30 million Americans have smoked marijuana (therefore possessing it, and, by logical implication, requiring someone to sell it to them), Davis' sentence, unlike Rummel's sentence, cannot be justified on the basis of his incapability to conform to the norms of society. The legislative changes in Virginia mentioned previously also

indicate a growing realization of the comparitively non-serious nature of marijuana offenses, where very small quantities are involved.

Finally, an objective factor unique to this case is the letter from Thomas B. Baird, Jr., the Commonwealth's Attorney who prosecuted the case in state court, contained in the record. Baird noted the "insignificant sentences" being imposed across the State and nation for comparable acts of drug distribution and candidly acknowledged that, in light of the wide disparities in sentencing, continued incarceration of Davis would represent a "gross injustice."

CONCLUSION

The subsequent revision of the statute under which respondent was sentenced has seriously diminished the

precedential importance of this case. Additionally, the district court's method of reviewing the term-of-years sentence, approved by the Fourth Circuit, is soundly rooted in established legal principle and presents no new significant legal issues for this Court's consideration. The Fourth Circuit's allowing the application of the proportionality criteria is not in conflict with the dictates of this Court as set forth in Rummel v. Estelle, and comports with the established rule in the other circuits. Those circuits reaching different conclusions in Eighth Amendment challenges to sentences are easily distinguishable from the case at bar; no case upholding a sentence comparable to Davis' involved an offense as insignificant as two offenses

committed by the respondent herein. The decision to invalidate the sentence was, in light of long-standing criteria applied by this Court, fair and proper, and was supported by substantial evidence. For the foregoing reasons, certiorari should be denied and the judgment of the Court below should be affirmed.

Respectfully submitted,

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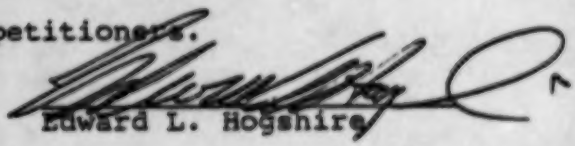
CERTIFICATE OF SERVICE

I, Edward L. Hogshire, coun-

sel for Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 28th day of August, 1981, I mailed or delivered the requisite copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to J. Marshall Coleman, Esquire, Attorney General of Virginia and to James E. Kulp, Esquire, Deputy Attorney General, 900 Fidelity Building, 830 E. Main Street, Richmond, Virginia, 23219, counsel for petitioners.



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